DEPARTMENT OF STATE REVENUE

04-20110174.LOF

Letter of Findings: 04-20110174
Gross Retail Tax
For the Years 2007, 2008, and 2009

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ISSUE

I. Set-Up Fees – Gross Retail Tax.

Authority: IC § 6-2.5-4-1(e); IC § 6-8.1-5-1(c); 45 IAC 2.2-4-27; 45 IAC 2.2-4-27(b).

Taxpayer argues that it was not required to charge sales tax on the price it charged its rental customers to "set-up" the property being rented.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of providing landscaping, decorating, and plant maintenance services. In addition, Taxpayer also manages its customers' "special events." The Department of Revenue (Department) conducted a sales and use tax audit. The audit review resulted in the assessment of additional sales and use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Set-Up Fees – Gross Retail Tax.

DISCUSSION

In addition to the services described above, Taxpayer rents plants, flowers, and decorative displays to its customers. Taxpayer collected sales tax on the cost of renting and on the cost for delivering these items. However, the Department's audit found that Taxpayer did not "collect tax on the gross receipts from renting tangible personal property." Specifically, the audit found that Taxpayer should have been collecting sales tax on the "set-up" charges invoiced to its customers. As a result, the audit assessed additional sales/use tax on these "set-up" charges.

As authority for the proposed adjustment, the audit report cited to 45 IAC 2.2-4-27 which states in relevant part as follows:

> (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [45 IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
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> (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
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> (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.
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> (d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.
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> (1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental of lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals. (Emphasis added).

For purposes of determining sales tax liability, 45 IAC 2.2-4-27(b) defines the rental of tangible personal property as a "retail transaction." However, IC § 6-2.5-4-1(e) also provides that otherwise exempt services are subject to sales tax when the services are performed in conjunction with the delivery or rental of the tangible personal property.

The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

(1) the price of the property transferred, without the rendition of any service; and

(2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication,

alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser. (Emphasis added).

Taxpayer clearly enters into "retail transactions" when it rents its property to its customers. The issue is whether the "set-up" costs are incurred prior to the delivery of the property to the customers. Taxpayer explains that these costs are not subject to sales tax as follows:

[T]angible personal property is transferred to customers under short term lease arrangements. Property is transferred to the customer when [T]axpayer delivers the property to the customer's site. Taxpayer charges and remits sales tax on the gross rent receipts and on separately stated delivery service charges associated with the delivery of the tangible personal property prior to the customer taking possession of the property. At the customer's option, the [T]axpayer may be engaged to set up the leased tangible personal property after the property has been delivered to the customer. Alternatively, the customer may choose to set up the leased property on their own.

Taxpayer explains that the "set-up" charges are separately negotiated, separately stated, and occur after delivery of the property to the customer. Taxpayer concludes that the "set-up" charges are exempt from tax under IC § 6-2.5-4-1(e).

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

45 IAC 2.2-4-27 provides that the "gross receipts" from renting tangible personal property are subject to sales and use tax and that these gross receipts are not reduced by "expenses or costs incidental to the conduct of the business." In addition, IC § 6-2.5-4-1(e) includes as "gross receipts" charges for "preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service" even if the charges are separately stated on the invoice.

The issue is whether Taxpayer performed the "set-up" of its plants, flowers, and decorative displays before or after Taxpayer's customers accepted delivery of those items. Resolution of the issue turns less on the timing of the items' delivery to the customers' location and more on the parties' intentions. In Taxpayer's case, its customers expect to obtain plants, flowers, and displays which have been adjusted and arranged to the customers' expectations; meeting those expectations involves tasks necessarily performed prior to the customers' acceptance of the tangible personal property. Taxpayer's customers want more than simple physical possession of the plants, flowers, and displays. The customers expect that Taxpayer will have expended time, resources, and expertise to the customers' satisfaction and that Taxpayer will have done so prior to the time when the customers receive the property. As such, the "set-up" charges are "part and parcel" of the gross receipts attributable to the rental of the tangible personal property and are properly subject to sales tax.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 10/26/2011 by Legislative Services Agency
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